

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CLIFFORD DOUGLAS,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

No. 1:15-CV-03119-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF No. 13, 17. Attorney D. James Tree represents Clifford Douglas (Plaintiff); Special Assistant United States Attorney Daphne Banay represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part,** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed an application for Supplemental Security Income (SSI) on January 5, 2012, alleging disability since June 1, 2007, due to suicidal thoughts,

1 back pain, neck pain, leg spasms, and depression. Tr. 291-297, 334, 339. The
2 application was denied initially and upon reconsideration. Tr. 208-216, 218-224.
3 Administrative Law Judge (ALJ) Mary Gallagher Dilley held a hearing on
4 November 13, 2013, at which Plaintiff, represented by counsel, and vocational
5 expert, Trevor Duncan, testified. Tr. 35-76. The ALJ issued an unfavorable
6 decision on December 16, 2013. Tr. 18-28. The Appeals Council denied review
7 on May 7, 2015. Tr. 1-4. The ALJ's December 16, 2013, decision became the
8 final decision of the Commissioner, which is appealable to the district court
9 pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on
10 July 9, 2015. ECF No. 1.

11 **STATEMENT OF FACTS**

12 The facts of the case are set forth in the administrative hearing transcript, the
13 ALJ's decision, and the briefs of the parties. They are only briefly summarized
14 here.

15 Plaintiff had prior applications for Disability Insurance Benefits (DIB) and
16 SSI on October 6, 2008. Tr. 80. Plaintiff attended a hearing before an ALJ on
17 these applications, and the ALJ issued an unfavorable decision denying benefits on
18 February 3, 2010. Tr. 80-89. The ALJ in that decision determined that Plaintiff
19 could perform a limited range of light work and identified Plaintiff's past relevant
20 work as carpet layer and construction worker, both jobs with heavy exertional
21 levels. Tr. 84, 87. Plaintiff then reapplied for DIB and SSI benefits on March 2,
22 2011. Tr. 274-289. Again, upon denial at the initial and reconsideration levels,
23 Plaintiff was found to be capable of a limited range of light work. Tr. 102, 117-
24 118, 135-136, 153-154.

25 Plaintiff filed his most recent SSI application at the age of 55. Tr. 291.
26 Plaintiff completed the twelfth grade in 1976. Tr. 340. He last worked in as a
27 temporary laborer in 2007, stating he stopped working because of his conditions.
28 Tr. 339-340.

STANDARD OF REVIEW

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo, deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial evidence will be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence supports the administrative findings, or if conflicting evidence supports a finding of either disability or non-disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a *prima facie* case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once the claimant establishes that physical or mental impairments prevent him from engaging in his previous occupations. 20 C.F.R. § 416.920(a)(4). If the claimant

1 cannot do his past relevant work, the ALJ proceeds to step five, and the burden
2 shifts to the Commissioner to show that (1) the claimant can make an adjustment to
3 other work, and (2) specific jobs exist in the national economy which the claimant
4 can perform. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194
5 (2004). If the claimant cannot make an adjustment to other work in the national
6 economy, a finding of “disabled” is made. 20 C.F.R. § 416.920(a)(4)(v).

7 ADMINISTRATIVE DECISION

8 On December 16, 2013, the ALJ issued a decision finding Plaintiff was not
9 disabled as defined in the Social Security Act.

10 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
11 activity since January 5, 2012, the date of the most recent SSI application. Tr. 20.

12 At step two, the ALJ determined Plaintiff had the following severe
13 impairments: lumbar degenerative disc disease and degenerative joint disease;
14 affective disorder; and somatoform disorder. Tr. 21.

15 At step three, the ALJ found Plaintiff did not have an impairment or
16 combination of impairments that met or medically equaled the severity of one of
17 the listed impairments. Tr. 21.

18 At step four, the ALJ assessed Plaintiff’s residual function capacity and
19 determined he could perform a range of medium of work with the following
20 additional limitations: “This individual can lift and carry 50 lbs. occasionally and
21 25 lbs. frequently. He is able to perform simple repetitive tasks.” Tr. 22. The ALJ
22 concluded that Plaintiff was able to perform his past relevant work as an
23 electronics assembler and forklift operator. Tr. 28.

24 The ALJ thus concluded Plaintiff was not under a disability within the
25 meaning of the Social Security Act at any time from January 5, 2012, through the
26 date of the ALJ’s decision, December 16, 2013. Tr. 28.

27 ISSUES

28 The question presented is whether substantial evidence supports the ALJ’s

1 decision denying benefits and, if so, whether that decision is based on proper legal
2 standards. Plaintiff contends the ALJ erred by (1) failing to properly weigh the
3 medical opinions in the file; (2) improperly separating out the duties of Plaintiff's
4 past relevant work; and (3) failing to properly consider Plaintiff's credibility.

5 DISCUSSION

6 A. Medical Opinions

7 Plaintiff argues that the ALJ failed to properly consider and weigh the
8 medical opinions expressed by Holly Bassier, D.O., Marie Ho, M.D., William
9 Shanks, M.D., Daniel Seltzer, M.D., and Jeff Merrill, M.D. ECF No. 13 at 7-16.

10 In weighing medical source opinions, the ALJ should distinguish between
11 three different types of physicians: (1) treating physicians, who actually treat the
12 claimant; (2) examining physicians, who examine but do not treat the claimant;
13 and, (3) nonexamining physicians who neither treat nor examine the claimant.
14 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
15 weight to the opinion of a treating physician than to the opinion of an examining
16 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). The ALJ should give
17 more weight to the opinion of an examining physician than to the opinion of a
18 nonexamining physician. *Id.*

19 When a treating physician's opinion is not contradicted by another
20 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.
21 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating
22 physician's opinion is contradicted by another physician, the ALJ is only required
23 to provide "specific and legitimate reasons" for rejecting the opinion of the first
24 physician. *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). Likewise, when
25 an examining physician's opinion is not contradicted by another physician, the
26 ALJ may reject the opinion only for "clear and convincing" reasons. *Lester*, 81
27 F.2d at 830. When an examining physician's opinion is contradicted by another
28 physician, the ALJ is only required to provide "specific and legitimate reasons" for

1 rejecting the opinion of the examining physician. *Id.* at 830-831.

2 The specific and legitimate standard can be met by the ALJ setting out a
3 detailed and thorough summary of the facts and conflicting clinical evidence,
4 stating his interpretation thereof, and making findings. *Magallanes v. Bowen*, 881
5 F.2d 747, 751 (9th Cir. 1989). The ALJ is required to do more than offer his
6 conclusions, he “must set forth his interpretations and explain why they, rather
7 than the doctors’, are correct.” *Embrey v. Bowen*, 849 F.2d 418, 421-422 (9th Cir.
8 1988).

9 **1. Holly Bassier, D.O.**

10 On January 16, 2008, Dr. Bassier completed Physical Evaluation form for
11 the Washington State Department of Social and Health Services (DSHS). Tr. 513-
12 516. Dr. Bassier diagnosed Plaintiff with lumbosacral degenerative disk, stating it
13 affected Plaintiff’s ability to sit, stand, walk, lift, handle, and carry. Tr. 515. She
14 opined that Plaintiff’s overall work level was sedentary, defined as “the ability to
15 lift 10 pounds maximum and frequently lift and/or carry such articles as files and
16 small tools. A sedentary job may require sitting, walking, and standing for brief
17 periods.” *Id.* She stated the overall limitations would continue for at least twelve
18 months. Tr. 516. In her chart notes, Dr. Bassier stated, “[w]ould rate as marked
19 impairment [with] degree of difficulty on physical exam and doubt [patient] could
20 perform any work above sedentary and even that with difficulty.” Tr. 458.¹

21 The ALJ gave Dr. Bassier’s opinion “limited weight” because (1) the
22 purpose of the evaluation was for a DSHS public assistance and not treatment, (2)
23 Dr. Bassier was not aware of Plaintiff’s activities of daily living, and (3) Dr.
24 Bassier did not mention Plaintiff’s history of drug use.

25
26 ¹The ALJ refers to this evaluation and opinion occurring on January 26,
27 2008, however, the evaluation report is dated January 16, 2008, the same date as
28 the DSHS evaluation form. Tr. 24, 457-458.

1 The ALJ's first reason for rejecting Dr. Bassier's opinion, that it was
2 procured for the purpose of determining DSHS public assistance, is not a specific
3 and legitimate reason.

4 The Ninth Circuit, the purpose for which medical reports are prepared does
5 not provide a legitimate basis for rejecting them. *Lester*, 81 F.3d at 832. The fact
6 that an evaluation was procured for the purpose of evaluating eligibility through
7 another agency program is not a specific and legitimate reason to reject the
8 opinion. Defendant concedes this in her brief. ECF No. 17 at 4.

9 The second reason that ALJ gave for rejecting Dr. Bassier's opinion, that
10 there was no evidence that Dr. Bassier was aware of Plaintiff's activities, such as
11 driving to Spokane to visit his grandchildren, is not a specific and legitimate
12 reason.

13 The Ninth Circuit has held that an ALJ may reject a doctor's opinion of a
14 claimant's limitations because they appear inconsistent with a claimant's level of
15 self-reported activity. *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001).
16 However, the ALJ failed to state how driving is inconsistent with Dr. Bassier's
17 opinion that Plaintiff was capable of sedentary work. *See Embrey*, 849 F.2d at
18 421-422 (the ALJ is required to do more than offer his conclusions, he "must set
19 forth his interpretations and explain why they, rather than the doctors', are
20 correct").

21 The ALJ's third reason for rejecting Dr. Bassier's opinion, that Dr. Bassier
22 did not mention Plaintiff's history of drug use, is not a specific and legitimate
23 reason. An ALJ may reject a physician's opinion of limitations because substance
24 use rendered the testing that the opinion was based upon unreliable. *Andrews*, 53
25 F.3d 1039. In *Andrews*, a psychologist performed psychological testing that was
26 determined to be unreliable due to drug use. *Id.* Here, there is no evidence that
27 Plaintiff's drug use rendered Dr. Bassier's objective evaluation on January 16,
28 2008, unreliable. Dr. Bassier completed a physical evaluation of Plaintiff's neck,

1 thoracic spine, and lumbar spine. Tr. 457. The evaluation included a review of
2 Plaintiff's 2005 MRI, range of motion testing, palpations, and strength testing. Tr.
3 457-458. Additionally, the ALJ determined that Plaintiff's drug use was not a
4 severe impairment earlier in the decision, Tr. 21, meaning it did not "significantly
5 limit" the ability to conduct "basic work activities." 20 C.F.R. § 416.921(a).
6 Considering none of the ALJ's reasons for rejecting Dr. Bassier's opinion met the
7 lesser standard of specific and legitimate, the ALJ failed to provide legally
8 sufficient reasons for her rejection of the opinion.

9 **2. Marie Ho, M.D.**

10 On June 18, 2011, Dr. Ho completed a consultative examination of Plaintiff.
11 Tr. 473-479. She diagnosed Plaintiff with degenerative disk disease and
12 anxiety/depression. Tr. 478. Dr. Ho opined that Plaintiff was limited to standing
13 and walking at least two hours, but less than four hours in an eight-hour workday,
14 he was limited to sitting less than six hours in an eight-hour workday, he was
15 limited to lifting and carrying ten pounds occasionally and ten pounds frequently,
16 and he was to avoid climbing, balancing, kneeling, stooping, and crouching. Tr.
17 478-479.

18 The ALJ gave limited weight to Dr. Ho's opinion because (1) she made no
19 mention of Plaintiff's history of drug use, and (2) Dr. Ho reviewed a 2005 MRI in
20 forming her opinion and this opinion was inconsistent with the 2008 MRI. Tr. 25.
21 Plaintiff asserts that the specific and legitimate standard applies to Dr. Ho's
22 opinion. ECF No. 13 at 10.

23 The ALJ's first reason for rejecting Dr. Ho's opinion, that she failed to
24 mention Plaintiff's history of drug use, is not a specific and legitimate reason. As
25 addressed above, an ALJ may reject a physician's opinion of limitations because
26 substance use rendered testing unreliable. *Andrews*, 53 F.3d 1039. Here, the ALJ
27 already credited that Plaintiff's sobriety date of April 24, 2011. Tr. 21. Therefore,
28 there is no evidence that Plaintiff was under the influence of any drugs during Dr.

1 Ho's June 18, 2011, evaluation sufficient to render Dr. Ho's testing as unreliable.

2 The ALJ's second reason for rejecting Dr. Ho's opinion, that she relied upon
3 a 2005 MRI and a more recent 2008 MRI contradicted her opinion, is not a
4 legitimate and specific reason supported by substantial evidence. The 2008 MRI
5 was compared to the November 29, 2005, MRI and the reviewing physician stated
6 that "[t]here has been no change in the lumbar spine since 11/29/2005." Tr. 467.
7 Therefore, it is immaterial which MRI was reviewed by Dr. Ho because each
8 revealed essentially the same findings. Therefore, the ALJ's reason is not
9 supported by substantial evidence. As such, the ALJ failed to provide legally
10 sufficient reasons for rejecting Dr. Ho's opinion.

11 **3. William Shanks, M.D.**

12 On September 25, 2008, Dr. Shanks evaluated Plaintiff and diagnosed him
13 with "[d]egenerative disc disease and arthritis in the lumbar spine, most
14 pronounced at L3-4, L4-5 and L5-S1 levels." Tr. 399-401. Dr. Shanks opined that
15 Plaintiff "would be severely restricted as far as his activity level in view of his
16 lumbar spine condition." Tr. 401. Dr. Shanks further opined that Plaintiff was
17 "severely limited" meaning "unable to lift at least 2 pounds or unable to stand
18 and/or walk." Tr. 403.

19 The ALJ gave "some weight" to Dr. Shanks' opinion because (1) it was not
20 as recent as Dr. Merrill's and Dr. Seltzer's opinions, (2) Dr. Shanks could not have
21 known Plaintiff's subsequent charge and incarceration for drug possession, and (3)
22 Dr. Shanks could not have known Plaintiff's self-reported activities and medical
23 improvement since his prison release in July 2011.

24 The ALJ's first reason for rejecting Dr. Shanks' opinion, that it was more
25 recent than Dr. Merrill's and Dr. Seltzer's opinions, does not meet the specific and
26 legitimate standard. As discussed below, the ALJ's reliance on Dr. Merrill's and
27 Dr. Seltzer's opinions are not free from error. Therefore the ALJ's determination
28 giving their opinions greater weight is not sufficient to reject Dr. Shanks' opinion.

1 The ALJ's second reason for rejecting Dr. Shanks' opinion, that he could not
2 have known of Plaintiff's subsequent charge and incarceration for drug possession,
3 is not a specific and legitimate reason. An ALJ may reject a physician's opinion of
4 limitations because substance use rendered the testing that the opinion was based
5 upon unreliable. *Andrews*, 53 F.3d 1039. However, Dr. Shanks stated that
6 Plaintiff's diagnosis was not caused or aggravated by alcohol or drug abuse. Tr.
7 404. Additionally, the ALJ failed to address how drug use would have rendered
8 Dr. Shanks' testing unreliable. The orthopedic exam included range of motion
9 testing palpation, straight leg raising tests, strength testing, muscle measures, and
10 x-rays. Tr. 400-401. It is unclear how heroin use would affect the results of these
11 physical test. Therefore, the ALJ's reason falls short of the specific and legitimate
12 standard.

13 The ALJ's third reason for rejecting Dr. Shanks' opinion, that Dr. Shanks
14 could not have known of Plaintiff self-reported activities and medical improvement
15 since his release in 2011, is not a specific and legitimate reason. An ALJ may
16 reject a doctor's opinion of a claimant's limitations because they appear
17 inconsistent with a claimant's level of self-reported activity. *Rollins*, 261 F.3d at
18 856. However, the ALJ failed to state what activity Plaintiff reported that was
19 inconsistent with Dr. Shanks' opinion. As for the medical improvement since
20 Plaintiff's release, the only medical improvement the ALJ found was in Plaintiff's
21 mental health impairments, not his physical impairments. Tr. 26. Additionally, the
22 2011 MRI showed additional degeneration when compared to the 2008 MRI, thus
23 supporting the notion that Plaintiff's physical impairments had not improved. Tr.
24 467, 490. The ALJ's reasons failed to meet the lesser standard of specific and
25 legitimate. Therefore, the ALJ failed to provide legally sufficient reasons for
26 rejecting Dr. Shanks' opinion.

27 **4. Daniel Seltzer, M.D.**

28 On July 25, 2011, Dr. Seltzer completed an evaluation for DSHS and

1 provided an opinion pending test results. Tr. 485-486. Prior to receiving the test
2 results, Dr. Seltzer opined Plaintiff could stand for two to four hours, sit for four to
3 six hours, occasionally lift 35 to 50 pounds, and frequently lift 25 to 35 pounds.
4 Tr. 485. On August 4, 2011, Dr. Seltzer provided an addendum to his report,
5 stating that he reviewed an MRI performed August 1, 2011, and stated “[t]here are
6 specific restrictions that would be applicable other than and avoidance of very
7 heavy types of jobs. Weight limitations would be in the range of approximately up
8 to 50 lbs. Otherwise there are no specific disabilities or limitations which would
9 be applicable.” Tr. 489. The ALJ gave Dr. Seltzer’s opinion “significant weight.”
10 Tr. 26.

11 Plaintiff argues that the ALJ erred in rejecting the limitations addressed in
12 the July 25, 2011, opinion. ECF No. 13 at 14-15. Defendant asserts that Dr.
13 Seltzer’s July 25, 2011, opinion was amended with the August 4, 2011, letter to
14 only include a lifting restriction. ECF No. 17 at 13. The Court agrees with
15 Defendant that Dr. Seltzer clearly intended to amend his opinion in the August 4,
16 2011, letter, therefore the letter is the opinion to be considered by the ALJ.
17 However, Dr. Seltzer’s opinion in the August 4, 2011, letter is unclear. First, Dr.
18 Seltzer states that there are specific restrictions in addition to a lifting restriction:
19 “There are specific restrictions that would be applicable other than and avoidance
20 of very heavy types of work.” Tr. 489. The next two sentences define Plaintiff’s
21 lifting restriction and contradicts the prior sentence by stating that besides the
22 lifting restriction “there are no specific disabilities or limitations which would be
23 applicable.” *Id.* Therefore, Dr. Seltzer’s opinion is on its face contradictory. It is
24 unclear if Dr. Seltzer intended to incorporate some of the exertional restrictions
25 from the July 25, 2011, letter or if he was actually just limiting Plaintiff to lifting
26 no more than 50 pounds. Considering the ALJ failed to provide legally sufficient
27 reasons to reject the opinions of the aforementioned physicians, the Court cannot
28 allow the ALJ’s reliance on Dr. Seltzer’s ambiguous opinion to stand.

1 **5. Jeff Merrill, M.D.**

2 On January 28, 2013, Dr. Merrill completed an evaluation and report for
3 DSHS. Tr. 553-554, 573-575. Dr. Merrill opined that Plaintiff could perform only
4 frequent postural changes, he could stand for six hours, and could lift 50 pounds.
5 Tr. 574. Dr. Merrill limited Plaintiff to medium work. Tr. 575. The ALJ gave Dr.
6 Merrill's opinion "significant weight." Tr. 25. However, the ALJ failed to address
7 any postural limitations in her residual functional capacity determination. Tr. 22.
8 Essentially, by failing to find any postural limitations as part of the residual
9 functional capacity, the ALJ rejected this portion of Dr. Merrill's opinion. Here,
10 the ALJ failed to provide any reason why Dr. Merrill's opinion, even a portion of
11 it, was rejected. Therefore, the ALJ erred in her treatment of Dr. Merrill's
12 opinion. While limiting postural activities to frequent may not have been a work
13 preclusive change to the residual functional capacity assessment, it could have
14 resulted in a different step four determination. Considering the ALJ failed to
15 provide legally sufficient reasons for rejecting the opinions of Dr. Bassier, Dr. Ho,
16 and Dr. Shanks, the Court cannot let the ALJ's reliance on Dr. Merrill's opinion
17 stand.

18 The case is hereby remanded for additional proceedings for the ALJ to
19 readdress the medical source opinions in the record.

20 **B. Past Relevant Work**

21 Plaintiff challenges the ALJ's step four determination in this case, arguing
22 that the ALJ erred in separating out Plaintiff's past relevant work at IBM² into two
23 separate jobs. ECF No. 13 at 18-19.

24 Plaintiff testified at the hearing that his work at IBM consisted of driving a
25 forklift and assembling kits of "sensitive parts that go out for computers." Tr. 51-

26
27 ²This work appears as General Warehouse Services Corporation on
28 Plaintiff's earnings statements. Tr. 51, 299.

52. He additionally testified that he held previous positions as a carpet installer. Tr. 50-51. The vocational expert testified that Plaintiff's past relevant work included flooring installer, requiring a heavy exertional level, and forklift operator, requiring a medium exertional level, and an electronic assembler, requiring a light exertional level. Tr. 68-69. In the December 16, 2013, decision, the ALJ found that Plaintiff was capable of performing his past relevant work as an electronics assembler and a forklift operator as the jobs were actually performed and as they are generally performed. Tr. 28. Essentially, the ALJ separated the work performed for IBM into two separate jobs.

At step four, a claimant has the burden to prove that he cannot perform his past relevant work "either as actually performed or as generally performed in the national economy." *Lewis v. Barnhart*, 281 F.3d 1081, 1083 (9th Cir. 2002). However, the ALJ may not classify a past job "according to the least demanding function." *Carmickle v. Comm'r of Soc. Sec. Admin*, 533 F.3d 1155, 1166 (9th Cir. 2008) (quoting *Valencia v. Heckler*, 751 F.2d 1082, 1086 (9th Cir. 1985)). In *Carmickle*, only 20 percent of the claimant's duties as a construction supervisor involved supervision; the remainder of his time was spent performing manual labor. *Id.* The Ninth Circuit held that the ALJ erred in categorizing the claimant's job as "a purely supervisory position." *Id.* Similarly, in *Valencia*, the ALJ erred in classifying the claimant's prior work as a "tomato sorter" involving only light exertion because the claimant was actually an "agricultural laborer" who mostly performed other, medium exertion tasks. 751 F.2d at 1086. And, in *Vertigan v. Halter*, the ALJ erred by categorizing the claimant's past work as a "cashier" when she was actually a "pharmacy clerk" and cashier work was only "a small part of her job." 260 F.3d 1044, 1051 (9th Cir. 2001). In all three cases "the least demanding aspect" of the claimant's past job was something the claimant did less than half the time, and the ALJ erred in equating that one task with a full time job. These cases were distinguished in the Ninth Circuit's recent decision in *Stacy v.*

1 *Colvin*, in which the claimant performed supervisory duties 70 to 75 percent of the
2 time. The Ninth Circuit held that the fact that he occasionally did other, non-
3 supervisory, tasks did not alter the fundamental nature of his work. Therefore, the
4 ALJ's determination that claimant's past relevant work included a Dictionary of
5 Occupational Titles (DOT) reference to a purely supervisory job was not in error.
6 No. 13-36025, 2016 WL 3165597 (9th Cir. June 7, 2016).

7 Here, the record is not sufficiently developed to determine if Plaintiff's job
8 at IBM as an electronics assembler was the least demanding function of the job and
9 should not be considered past relevant work under *Carmickle*, *Valencia*, and
10 *Vertigan* or if it was the task Plaintiff performed a majority of the time and should
11 be considered as past relevant work instead of the occupation of forklift operator
12 under *Stacy*.

13 Defendant argues that because the ALJ found Plaintiff capable of
14 performing both tasks, *Carmickle*, *Valencia*, and *Vertigan* do not apply. ECF No.
15 17 at 17-18. However, because the case is being remanded with instructions to
16 reconsider the weight provided to medical source opinions and to form a new
17 residual functional capacity determination, it is necessary for the ALJ to readdress
18 step four on remand.

19 The Court acknowledges that on remand the work performed at IBM may be
20 outside the time frame to be considered past relevant work. *See* 20 C.F.R. §
21 416.965(a). However, should the ALJ consider the work performed at IBM for
22 any purpose, the ALJ is instructed to take additional testimony regarding the
23 proportionality of each task performed and determine whether or not one task was
24 performed at a high enough rate that the other task was not sufficient to change the
25 fundamental nature of the work. If the ALJ determines that the work at IBM was a
26 true composite job and is unable to determine if one task was the fundamental
27 nature of the work, the ALJ is directed to POMS DI 25005.020, providing that an
28 ALJ is required to determine whether or not a claimant is able to perform a

1 composite job as actually performed because there is no representation of a
2 composite job in the DOT.

3 **C. Credibility**

4 Plaintiff also challenges the credibility determination made by the ALJ.
5 ECF No. 13 at 16-18. Considering the case is being remanded for additional
6 proceedings, the ALJ is instructed to address Plaintiff's symptom statements on
7 remand.

8 **REMEDY**

9 The decision whether to remand for further proceedings or reverse and
10 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
11 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
12 where "no useful purpose would be served by further administrative proceedings,
13 or where the record has been thoroughly developed," *Varney v. Secretary of Health*
14 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused
15 by remand would be "unduly burdensome," *Terry v. Sullivan*, 903 F.2d 1273, 1280
16 (9th Cir. 1990). *See also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)
17 (noting that a district court may abuse its discretion not to remand for benefits
18 when all of these conditions are met). This policy is based on the "need to
19 expedite disability claims." *Varney*, 859 F.2d at 1401. But where there are
20 outstanding issues that must be resolved before a determination can be made, and it
21 is not clear from the record that the ALJ would be required to find a claimant
22 disabled if all the evidence were properly evaluated, remand is appropriate. *See*
23 *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211
24 F.3d 1172, 1179-80 (9th Cir. 2000).

25 In this case, it is not clear from the record that the ALJ would be required to
26 find Plaintiff disabled if all the evidence were properly evaluated. Further
27 proceedings are necessary for the ALJ to properly consider and weigh the medical
28 source opinions in the record. In addition, the ALJ is instructed to assess

1 Plaintiff's symptom statements, form a new residual functional capacity
2 determination reflecting the medical source opinions credited in the file, and make
3 a new step four determination. Furthermore, the ALJ is to supplement the record
4 with any additional outstanding medical evidence. The Court notes that there is a
5 prescription for an EMG/Nerve Conduction testing on the lower extremities
6 written on July 25, 2011, by Dr. Seltzer. Tr. 491. The ALJ is specifically
7 instructed to supplement the record with this nerve conduction testing if it was in
8 fact performed.

9 CONCLUSION

10 Accordingly, **IT IS ORDERED:**

11 1. Defendant's Motion for Summary Judgment, **ECF No. 17**, is
12 **DENIED**.

13 2. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is
14 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
15 additional proceedings consistent with this Order.

16 3. Application for attorney fees may be filed by separate motion.

17 The District Court Executive is directed to file this Order and provide a copy
18 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
19 **and the file shall be CLOSED.**

20 DATED August 15, 2016.



A handwritten signature in black ink, appearing to be "M", is written over a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE